No. 83-1298

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

OIL, CHEMICAL, AND ATOMIC WORKERS
INTERNATIONAL UNION AND ITS LOCAL 4-23,

Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR
and
AMERICAN PETROFINA COMPANY OF TEXAS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT AMERICAN PETROFINA COMPANY OF TEXAS

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Supreme Court Rule 28.1

American Petrofina Company of Texas submits the following list of parent companies, partially-owned subsidiaries, and affiliates in compliance with Supreme Court Rule 28.1:

American Petrofina, Incorporated
Petrofina Delaware, Incorporated
American Petrofina Exploration Company

American Petrofina Holding Company
Petrofina S.A.
Fina Supply Inc.
American Petrofina Marketing Inc.
Cosden Oil & Chemical Company
Cosden Technology, Inc.
Sigma Coatings, Inc.
Fin-Oil, Inc.
American Petrofina Pipe Line Company

QUESTION PRESENTED

Whether the Occupational Safety and Health Act of 1970 ("OSHA" or the "Act") permits employees or their representatives to challenge the terms of a settlement agreement reached by the Secretary of Labor and an employer after the employer has withdrawn its notice of contest.

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BRIEF IN OPPOSITION OF RESPONDENT AMERICAN PETROFINA COMPANY OF TEXAS

Respondent American Petrofina Company of Texas ("American Petrofina" or the "Company") urges that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Donovan v. Oil, Chemical, and Atomic Workers International Union*, 718 F.2d 1341 (5th Cir. 1983), be denied for the reasons set forth below.

STATEMENT OF THE CASE

The present controversy began in the fall of 1979, when Occupational Safety and Health Administration inspectors conducted inspections of a construction work site at American Petrofina's oil refinery at Port Arthur, Texas. As a result of the inspections, citations for alleged violations of several OSHA regulations relating to asbestos handling were issued to the Company's construction contractors and their subcontractors, and to American Petrofina as well.[1] The citations did not concern employee exposure to asbestos; rather, they related to such ancillary matters as the initial monitoring, tagging, and bagging of asbestos, and other non-asbestos related standards.

American Petrofina was not actually engaged in the work which was the subject of the OSHA citations, but was merely the owner of the construction project where the violations were alleged to occur. The citations issued to the contractors and subcontractors were settled without opposition by either their or American Petrofina's employees or authorized employee representatives. Those settlement agreements were subsequently affirmed.

In each of the two cases resulting from the citations issued to American Petrofina, the authorized employee representative, the Oil, Chemical, and Atomic Workers International Union and its Local 4-23 (the "Union"), elected party status, pursuant to Rule 20 of the Rules of the Occupational Safety and Health Review Commission (the "Commission"), 29 C.F.R. § 2200.20.[2] After lengthy negotiations, American Petrofina and the Secretary of Labor (the "Secretary") executed a compromise settlement agreement in each case. Although the

[1] American Petrofina was cited on the ground that while its employees were not engaged in the construction work, they allegedly had access to the claimed hazards. Because of the consummation of the settlement agreements, those issues have not been litigated.

[2] The Union represents American Petrofina's refinery employees, rather than the employees who performed the construction work which is the subject of the citations.

Union was provided the opportunity for meaningful participation (and actually did participate) in settlement negotiations, it declined to execute the settlement agreements. Among other provisions contained in the agreements, the Company represented that all alleged violations set forth in the citations had been abated. The agreements also recited the fact that a meeting was held with the employees' representative regarding settlement prior to the drafting of the agreements so that the representative would have an opportunity for meaningful input. In exchange for the Company's agreement to withdraw its notices of contest, the proposed penalties were eliminated in one of the administrative proceedings (OSHRC Docket No. 80-1671), and reduced in the other (OSHRC Docket No. 79-6847).[3]

Separate hearings on the two settlement agreements were conducted, at which the Union's representative agreed that abatement had occurred because the construction project had been completed. Over the Union's objections, the settlement agreements were subsequently affirmed.

The Union petitioned for discretionary review in both cases. When the Commission granted the Union's petition, the Secretary filed a motion to vacate the Commission's direction for review. The Secretary's motion was denied on March 25, 1983. The Secretary then sought review of the denial of his motion in the United States Court of Appeals for the Fifth Circuit.

In a decision rendered on November 7, 1983, the Court of Appeals held that once an employer has withdrawn its notice of contest, a union's challenge to a settlement agreement is limited to the reasonableness of the abatement period, and the Com-

[3] The Circuit Court opinion erroneously recites that the Company agreed to withdraw its notices of contest in return for, *inter alia*, "elimination of the penalties." 718 F.2d at 1344.

mission loses its jurisdiction to consider the employees' petition for review of the terms of the settlement agreement. Because the Union had never contested the reasonableness of the abatement period in this case, the Court of Appeals vacated the order of the Commission denying the Secretary's motion to vacate the review order and remanded the case to the Commission to dismiss the Union's petition for review.[4] The Union now seeks review of the Fifth Circuit's ruling.

REASONS FOR DENYING THE WRIT

The petition fails to satisfy any of the criteria enumerated in Rule 17 of the Rules of this Court for review by certiorari.

I. THE DECISION OF THE COURT OF APPEALS IS ENTIRELY CONSISTENT WITH THE UNIFORM DECISIONS OF ALL OTHER COURTS OF APPEALS WHICH HAVE ADDRESSED THE ISSUE OF THE AUTHORIZED EMPLOYEE REPRESENTATIVE'S RIGHT TO CONTEST SETTLEMENT AGREEMENTS.

Petitioner contends that the courts of appeals have reached "conflicting conclusions" (Petitioner's Brief, at 6) on the issue of whether the Commission has jurisdiction to review a settlement agreement, and whether authorized employee representatives may challenge the terms of a settlement agreement, other than the reasonableness of the abatement period, after an employer withdraws its notice of contest. Conceding that the Court of Appeals "acquiesced in the decisions of the other circuits" (Petitioner's Brief, at 8 and 9), Petitioner strains to support its position by asserting that the reasoning, rather than the ruling, of the Court of Appeals differs from the decisions of the other circuits. This argument cannot withstand judicial scrutiny.

[4] The Commission complied with the Circuit Court order by dismissing the petition for review on December 22, 1983.

To establish a conflict among the circuits within the meaning of Rule 17.1(a), a petitioner must show that the *decision* rendered by the court below conflicts with the decisions of other appellate courts on the same matter. A court's reasoning or method of analysis cannot establish a conflict warranting Supreme Court review where, as here, the ultimate ruling is in complete accordance with the decisions of other federal appellate courts.

In this case, the Fifth Circuit framed its holding as follows:

> If the employer subsequently withdraws its notice of contest, however, the employees are limited to challenging the abatement period; and the Commission loses jurisdiction to entertain the employees' petition for review of the settlement agreement's terms. [Footnote omitted.]

718 F.2d at 1353. This ruling is fully consistent with the decision of every other court of appeals that has considered the question. The Second, Third, Fourth, and Eighth Circuit Courts of Appeals have uniformly held that an employer's withdrawal of a notice of contest to an OSHA citation deprives the Commission of jurisdiction to review a settlement agreement and to consider employee objections to its terms, except as to the reasonableness of the abatement period.[5] Commentary in

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[5] *Donovan v. OSHRC (Mobil Oil Corp.)*, 713 F.2d 918 (2d Cir. 1983); *Marshall v. Sun Petroleum Products Co.*, 622 F.2d 1176 (3d Cir.), *cert. denied*, 449 U.S. 1061, 101 S.Ct. 784, 66 L.Ed.2d 604 (1980); *Marshall v. Oil, Chemical, and Atomic Workers International Union, Local 4-208 (American Cyanamid Co.)*, 647 F.2d 383 (3d Cir. 1981); *Donovan v. United Steelworkers of America*, ____ F.2d ____, 11 O.S.H. Cas. (BNA) 1698 (4th Cir. November 1, 1983); *Donovan v. International Union, Allied Industrial Workers of America*, 722 F.2d 1415 (8th Cir. 1983). *See also Marshall v. OSHRC (IMC Chemical Group, Inc.)*, 635 F.2d 544 (6th Cir. 1980); *Oil, Chemical, and Atomic Workers International Union, Local 3-499 v. OSHRC*, 671 F.2d 643 (D.C. Cir.), *cert. denied sub nom. American Cyanamid Co. v. Oil, Chemical, and Atomic Workers International Union*, ____ U.S. ____, 103 S.Ct. 206, 74 L.Ed.2d 165 (1982), which were also relied upon by the Fifth Circuit in its decision.

the Fifth Circuit panel majority's opinion on the rationale employed (or not employed) in the unanimous line of cases from other circuits is insufficient to warrant a grant of certiorari.

Significantly, the Fifth Circuit's ruling was expressly designed to achieve unanimity among the circuits. Recognizing the "need for uniformity," the Fifth Circuit stated:

> Were we to march to the beat of our own drummer, a gross disparity would arise between the Secretary's ability to settle cases in this circuit and his ability to do so elsewhere. Therefore, . . . we acknowledge that the Act can reasonably be interpreted more than one way, and we adopt a course that at least will not precipitate administrative chaos.

718 F.2d at 1353. It is readily apparent from the opinion that the Fifth Circuit specifically intended to avoid a conflict with the decisions of other courts of appeals. Therefore, although the courts of appeals may have divergent views concerning the permissible extent of employee participation in adjudicatory proceedings under the Act prior to the consummation of a settlement agreement, the Fifth Circuit's decision regarding the Commission's jurisdiction to review settlement agreements creates no conflict with the decisions of other courts of appeals requiring resolution by this Court.

II. THE RULING OF THE COURT OF APPEALS IS LEGALLY SOUND AND RAISES NO QUESTION WORTHY OF SUPREME COURT REVIEW.

The Court of Appeals correctly decided that the authorized employee representative was not entitled to a hearing on its objections to the terms of the settlement agreements reached by the Secretary of Labor and American Petrofina once the Company agreed to withdraw its notices of contest and when the reasonableness of the abatement period is not in issue. The Act requires that the Commission afford an opportunity for a hearing only if an employer files a notice of contest, or if

employees or their representative files a notice with the Secretary alleging that the established period of abatement is unreasonable. 29 U.S.C. § 659(c). If the employer's notice of contest is withdrawn, only the abatement period may be challenged by the employees. Thus, the Court of Appeals' ruling is supported by the Act's statutory language, its legislative history, the overwhelming weight of judicial authority, and sound considerations of public policy.

To confer upon a union standing to challenge the substantive provisions of the settlement agreement other than the reasonableness of the abatement period would usurp the prosecutorial discretion exclusively vested by Congress in the Secretary of Labor. *Marshall v. OSHRC (IMC Chemical Group, Inc.), supra,* 635 F.2d at 550. This prosecutorial power includes the discretion to withdraw or settle citations issued to employers. And, as the Court of Appeals correctly recognized, any other result would effectively discourage employers from entering into settlement agreements. 718 F.2d at 1353. If employers believe that protracted litigation proceedings may ensue following the execution of settlement agreements, the incentive to resolve the matter expeditiously through the settlement process will be lost.

Certiorari is inappropriate in this case for an additional reason. Under Supreme Court Rule 17.1(c), a petition for a writ of certiorari may be granted when a federal court of appeals has "decided an important question of federal law which has not been, but should be, settled by this Court. . . ." Confronted with the same issue of an authorized employee representative's standing to challenge the terms of a settlement agreement, this Court has previously declined to grant certiorari. *See Marshall v. Sun Petroleum Products Co., supra. See also Oil, Chemical, and Atomic Workers International Union, Local 3-499 v. OSHRC, supra.* The denial of certiorari in these similar cases indicates that the Supreme Court did not consider the question to be sufficiently important to merit its review.

This case does not present any unique facts to warrant a reversal of the Supreme Court's practice of denying review of the issue.

Moreover, in view of the particular factual background of this case, the statutory purposes of the Act would not be furthered by union intervention in the instant controversy. Because the authorized employee representative had an adequate opportunity to be heard on the settlement agreements during the actual settlement process, the Union may not claim that its objections were never afforded due consideration.[6] The Union does not even represent the employees who performed the construction work which was the subject of the citations. Rather, it represents American Petrofina's refinery employees who, the Union contends, had access to alleged construction hazards by virtue of their mere presence at the site.[7] In addition, the construction work which was the subject of the citations was performed not by American Petrofina, but by its contractors and subcontractors. Consequently, American Petrofina had available the defense that it could not be held liable for cited conditions which it did not create, cause, or for which it was not otherwise responsible.[8]

The Union's contention that the cited conditions have not been abated (Petitioner's Brief, at 4) is entirely erroneous. The Union presumes that American Petrofina is guilty of the

[6] Specifically, the authorized employee representative in these cases participated in extensive discussions with members of the Regional Solicitor's Office concerning the proposed settlement agreements. Before the settlements were reached, officials from the Regional Solicitor's Office held a conference attended by all parties, including a representative of the Union.

[7] So far as American Petrofina has been able to ascertain, no employees or representatives of the construction employees who were actually engaged in the removal of the asbestos (and the associated tasks of monitoring, tagging, and bagging) contested the settlements entered into by the employers involved.

[8] *See Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081 (7th Cir. 1975). The merits of this defense were never reached or litigated because the citations were settled.

violations alleged in the citations. It is American Petrofina's position, however, that it is and always has been in compliance with the requirements of the standards. Because settlements were reached, the merits of the citations were never adjudicated and the Company has never litigated its numerous substantive defenses to the citations. The Company purposefully refrained from introducing any evidence as to its compliance with the pertinent standards at the administrative hearings because of its belief, based on established precedent, that the Union had no standing to challenge the settlement agreements.

Petitioner also claims that the settlement has failed to abate the hazard (Petitioner's Brief, at 21 n.25), even though the Union admitted at the administrative hearings that abatement occurred, even if for no other reason, by virtue of the fact that the construction project had been completed.[9] Petitioner's opposition to the settlement agreements is in fact an attempt to require compliance with the standards during all future construction projects, of whatever type, in all areas of American Petrofina's facility, whether or not they were the subject of the citations. Petitioner's Brief, at 4 n.2. The Union's effort to obtain a sweeping, prospective type of abatement plan in contravention of OSHA's established enforcement scheme does not merit review by this Court.[10]

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[9] Transcript of Proceedings, OSHRC Docket No. 80-1671, November 14, 1980, at 11; Transcript of Proceedings, OSHRC Docket No. 79-6847, March 20, 1981, at 48.

[10] Denial of the Union's petition will not deprive the Union of a remedy in the future. The statute establishes a procedure whereby the Union can monitor the Company's compliance with the asbestos standards during future construction operations at the refinery. If the Union believes that a violation has occurred, it can lodge an employee complaint with the Secretary. The Secretary can then make an expedited inspection, determine whether a violation has in fact occurred, and determine the nature of the prosecution, if any, to conduct. 29 U.S.C. § 657(f). The Union's effort to circumvent the established statutory enforcement scheme should not be condoned.

Finally, Petitioner has argued that the Company contested the citation to avoid any duty to take corrective action. Petitioner's Brief, at 4 n.2. This argument is wholly devoid of merit. If American Petrofina were seeking to delay and thereby avoid its duty to abate the violation, it would not have entered into settlement agreements. Rather, such dilatory motives would have been better served by proceeding to full hearings on the merits of the citations, resulting in far more lengthy proceedings than those which would have taken place had the Union not opposed the approval of the settlement agreements.

In view of all the foregoing facts, it is eminently clear that this case does not present an appropriate vehicle to carve out an exception to the general statutory rule that an authorized employee representative has standing to object only to the reasonableness of the abatement period with respect to a settlement agreement.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 16th day of March, 1984, three copies of the foregoing Brief in Opposition were served upon Petitioners and the Respondent Secretary of Labor by placing same in the United States Mail, postage prepaid, addressed to their respective attorneys of record:

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